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Sec. 1 — 2

9 — 2

In the Supreme Court of the United States

OCTOBER TERM, 1941

NOS. 543, 544, 545

ANDREW GRANT ILSENG, JR., ANDREW G. ILSENG AND LESLIE A. MCKERCHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 840–853) is reported at 120 F. (2d) 823.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 13, 1941 (R. 854–856), and a rehearing denied July 23, 1941 (R. 857). The petition for a writ of certiorari was filed August 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a sufficient foundation was laid for the introduction in evidence of certain books and records.

2. Whether it is proper, pursuant to the Act of June 20, 1936, to admit in evidence in a criminal proceeding commenced in 1937 entries in books and records made before the enactment of that statute.

STATUTES INVOLVED

The Act of June 20, 1936, 49 Stat. 1561, 1562, 1564 (28 U. S. C., Supp. V, Sec. 695–695h), provides:

> * * * That in any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown

to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

* * * * *

SEC. 9. This Act shall be prospective only, and not retroactive.

STATEMENT

An indictment returned September 29, 1937, charged petitioners in nineteen counts with using the mails to defraud and, in one count, with conspiracy (R. 2–99). It alleged that from 1932 to 1937 petitioners devised and carried out a scheme to defraud by inducing certain individuals and firms to invest money in, and extend credit to, various mining corporations, organizations, and interests, of which petitioners were officers, agents, and employees. It alleged that false representations and promises were knowingly made by petitioners for the purpose of obtaining money and other things of value from investors and creditors; and that in furtherance of the scheme various letters, pamphlets, maps, advertisements, and other papers, each containing fraudulent statements, were sent through the United States mails. The case was tried to a judge without a jury and resulted in findings of guilt and sentences of all of the petitioners on all counts except 9 and 16 (R. 106–112). No disposition was made as to these two counts.

Certain books and records of one of petitioners' corporations were introduced at the trial as evidence of the falsity of representations concerning the financial condition of that company. F. E. Smith, a Post Office inspector, testified that he had seized books and records in the office of the International Mining and Milling Company, the corporation involved, and that these books were in the same condition at the time of the trial as they were when he first looked at them, with one immaterial exception (R. 158). Robert V. Schupbacher testified that he was an accountant employed by the International Mining and Milling Company from April 2, 1934, to August 23, 1936, and kept the books during that period; that the books exhibited to him while he was testifying were the books of the company which he kept; and that he had made entries in some of them during his employment but had not made entries in all nor made all the entries in any (R. 421–424). John L. Reimer, a certified public accountant, testified that he was employed by petitioner Ilseng, Sr., in May 1937, to make an audit for the International Mining and Milling Company and that the books produced by the Government at the trial were the books made available to him for audit purposes (R. 449).

The trial judge found that a sufficient foundation had been laid and admitted the books and records in evidence (R. 424–429), and his action was affirmed on appeal.

ARGUMENT

I

Petitioners contend that the books and records were not shown to have been kept in the regular course of business and hence that no proper foundation was laid for their introduction in evidence under the Act of June 20, 1936, *supra* (Pet. 16–18, 20). Apart from the internal evidence supplied by the books and records themselves, it is a sufficient answer to this, as the Circuit Court of Appeals indicated (R. 846), that the uncontradicted testimony shows that they were furnished both to Schupbacher as bookkeeper, and to Reimer, the certified public accountant, for purposes of audit, by petitioner Ilseng, Sr., as the books and records of the International Mining and Milling Company. Whether books and records have been sufficiently identified to afford a proper foundation for their admission is a matter within the sound discretion of the trial judge. *St. Paul Fire and Marine Ins. Co.* v. *American Food Products Co.*, 21 F. (2d) 733, 736, 737 (C. C. A. 8), certiorari denied, 277 U. S. 597. Since the trial court found that petitioners Ilseng, Jr., and McKercher were co-conspirators with Ilseng, Sr.,[1] these records were on the same ground admissible against them.

[1] It is not true, as petitioners contend (Pet. 18), that the Circuit Court of Appeals reasoned in a circle in finding that Ilseng, Jr., and McKercher were parties to the conspiracy by consulting the books and records themselves. It is clear

II

(a) Petitioners contend further that entries in books and records made before the effective date of Section 1 of the Act of 1936, are not admissible thereunder in view of the provision of Section 9 that the statute shall have only prospective application (Pet. 19–22). It is apparent, however, that the language in Section 9 means no more than that Section 1 shall not be construed to change evidentiary rules in cases pending at the time of its passage. Section 1 is a remedial statute enacted to obviate difficulty in introducing records into evidence because of the absence, death, or nonavailability of the entrants and in recognition of the use of mechanical devices and the subdivision of function in the making of records under modern corporate accounting methods. The statute is clearly aimed not at the validating of the entries themselves but only at facilitating their admission in evidence, so that inquiry as to the particular date on which an entry was made is not helpful in a situation in which, as here, it is sought to be introduced in an action begun after the effective date of the statute (49 Stat. 1559, 1564).[2] *Landay* v. *United States*, 108 F. (2d) 698,

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the court reached the conclusion that they were involved in the conspiracy from evidence other than the books and records (R. 848–852).

[2] The statute became effective June 20, 1936 (49 Stat. 1561, 1564); the indictment was returned September 29, 1937 (R. 99).

704–707 (C. C. A. 6), certiorari denied 309 U. S. 681; *United States* v. *Kelley,* 105 F. (2d) 912, 917 (C. C. A. 2).

Petitioners' argument on this point is substantially the same as that urged in support of a petition for writ of certiorari in the *Landay* case, *supra,* which this Court denied, 309 U. S. 681. The petitioner in that case, as in this, endeavored to trace a conflict with *Valli* v. *United States,* 94 F. (2d) 687 (C. C. A. 1). The opinion and record in the *Valli* case, however, do not reveal the date upon which the indictment was filed, and it is a permissible inference from the allegations of the indictment that it was returned prior to the effective date of Section 1.[3]

(b) The books and records were, we submit, admissible even without the assistance of Section 1. Prior to the enactment of that section the course of decision in federal courts had been one of increasing liberality in the admission of books and records because of the realization of the growing complexity and magnitude of commercial transactions and the resultant impracticality or impossibility of producing individual entrants. These deci-

[3] See record in the *Valli* case, No. 814, October term, 1937, pp. 2, 3, and 6. The principal question in that case was the admissibility of intrastate telephone conversations intercepted by the Government by wire tapping. After certiorari was granted, 303 U. S. 632, the case was dismissed upon the motion of petitioners, 304 U. S. 586.

sions in themselves would support the admission of these books and records.[4]

(c) The books and records were introduced only in support of the misrepresentations concerning the financial condition of the International Mining & Milling Company. The indictment alleged other misrepresentations with reference to the productive qualities of petitioners' mining properties (R. 7–15). As indicated in the opinion of the Circuit Court of Appeals (R. 843), these misrepresentations were abundantly proved. It was unnecessary for the Government to establish the falsity of all the misrepresentations specified in the indictment.

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[4] Illustrative of this tendency are: *Mississippi River Logging Co.* v. *Robson*, 69 Fed. 773 (C. C. A. 8); *Wilkes* v. *United States*, 291 Fed. 988, 993 (C. C. A. 6); *E. I. Du Pont de Nemours & Co.* v. *Tomlinson*, 296 Fed. 634, 641 (C. C. A. 4); *United States* v. *Mammoth Oil Co.*, 14 F. (2d) 705, 732 (C. C. A. 8), affirmed, 275 U. S. 13; *Massachusetts Bonding & Ins. Co.* v. *Norwich Pharmacal Co.*, 18 F. (2d) 934 (C. C. A. 2); *Cub Fork Coal Co.* v. *Fairmont Glass Co.*, 19 F. (2d) 273 (C. C. A. 7); *Adler* v. *New York Life Ins. Co.*, 33 F. (2d) 827, 832 (C. C. A. 8); *United States* v. *Cotter*, 60 F. (2d) 689 (C. C. A. 2), certiorari denied, 287 U. S. 666; *Jennings* v. *United States*, 73 F. (2d) 470, 473 (C. C. A. 5); *Johnson* v. *United States*, 89 F. (2d) 913, 915 (C. C. A. 6); *Capozzi* v. *United States*, 90 F. (2d) 921, 923 (C. C. A. 3); *O'Shea* v. *United States*, 93 F. (2d) 169, 171 (C. C. A. 6).

CONCLUSION

The petition for writ of certiorari presents no question of general importance and there exists no actual conflict of decisions. We therefore respectfully submit that it should be denied.

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